Supreme Court, U.S.
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No. 98-1389

In The

Supreme Court of the United States

October Term, 1998

DAVID M. DUREE,

Petitioner,

v.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Kansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Kansas Supreme Court correctly decide that an attorney, who was sanctioned by a judge who later recused herself, was afforded due process when a different judge denied a motion to set aside the sanctions, after subjecting the recused judge to deposition and cross-examination at a full evidentiary hearing and after making a finding of fact that "a reasonable person would believe, based upon the testimony of [the recused judge], that there was no influence or bias on her part with respect to the decision that was filed."

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Doctor's Associates, Inc. ("DAI") respectfully opposes the petition for a writ of certiorari filed by petitioner David Duree.

In this case, a Kansas state court, acting pursuant to state law, ordered Mr. Duree, an attorney for clients suing DAI, to pay DAI's litigation costs after finding from the evidence that Mr. Duree had opposed DAI's motion for summary judgment in bad faith and on the basis of a false income tax return that Mr. Duree had directed his accounting expert to prepare and file on behalf of Mr. Duree's clients. Understandably, the court also revoked Mr. Duree's *pro hac vice* admission when his misconduct came to light. In affirming the award of costs and revocation of Mr. Duree's *pro hac vice* admission, the Kansas Supreme Court unanimously held in a comprehensive opinion that the sanctions were fully appropriate and supported by substantial evidence in the record and Kansas law and that Mr. Duree's suggestion that his due process rights were violated was meritless. The fact-specific ruling by the Kansas Supreme Court that Mr. "Duree was afforded notice and a hearing" at every stage of the proceeding, and that the courts that imposed these sanctions were fair and impartial, presents no question of federal law that warrants review in this Court.

STATEMENT OF THE CASE

1. Judge Russell's Decision to Impose Sanctions and Revoke Mr. Duree's *Pro Hac Vice* Admission

The core facts of this case are distressingly simple. As the record clearly showed, Mr. Duree directed the preparation and the filing of a false, amended 1989 partnership tax return for the franchise operated by his clients, Nancy Kessler and Dane Banks. The original 1989 partnership tax return and all the other evidence showed that the Kessler/Banks business earned a profit in 1989, but the fraudulent amended return – which deliberately understated gross revenue by about 50% – claimed a loss. Mr. Duree then purposefully used the false return to assert claims in Kansas state court against DAI for purported losses to the Kessler/Banks franchise and to oppose DAI's motion for summary judgment on those claims.

Mr. Duree finally admitted, under oath, that he made the "executive decision" to have his accounting expert manufacture the fraudulent amended return for reasons of "trial strategy" and "case management." Petitioner's Appendix ("Pet. App.") 39a, 50a, 87a. As the Kansas Supreme Court found based upon its "review of the voluminous record," Mr. "Duree himself understood the shortcomings of his clients' case from the outset but tried to cover them up by fabricating evidence." Pet. App. 103a-104a.

Mr. Duree tried his best to mislead the Kansas trial court with this false evidence, but he was eventually caught and received the appropriate punishment when Johnson County District Court Judge Janice D. Russell revoked his *pro hac vice* admission, which she had granted

when Mr. Duree first appeared in the case. Because, the judge found, Mr. Duree had employed the fraudulent tax return, other bad faith acts and various bogus legal theories to assert a claim against DAI without a reasonable basis in fact and not in good faith, Judge Russell also ordered Mr. Duree to pay the legal fees and costs that DAI had incurred in defending against the meritless claim. Pet. App. 43a, 53a-54a. In deciding to impose sanctions, Judge Russell had the benefit not only of the testimony of those involved as well as documentary evidence demonstrating Mr. Duree's misconduct, but she also had unrebutted expert testimony from Professor Geoffrey C. Hazard, a leading expert on legal ethics, that Mr. Duree had violated his ethical duties to the court by asserting claims in bad faith and by "[c]onceiv[ing], direct[ing] and execut[ing] a plan whereby a false document . . . was prepared for introduction into evidence before the court as evidence that his clients suffered economic loss, knowing that such proof was false and that it would mislead the Court and jury." Pet. App. 88a. Regrettably, this was not the first time that Mr. Duree has been sanctioned for bad faith conduct in cases involving DAI.[1]

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[1] Mr. Duree has a long record of sanctions in cases against DAI. He has been sanctioned three times in Kansas in amounts totaling over $414,000, *Subway Restaurants, Inc. v. Kessler*, No. 91-C12370 (Kan. Dist. Ct. Aug. 24, 1993); Pet. App. 53a-54a, 86a; twice by a California state court for amounts totaling over $16,000, *Weible v. Doctor's Associates, Inc.*, No. BC-03552 (Cal. Super. Ct. Aug. 10, 1994); *Weible v. Doctor's Associates, Inc.*, No. BC-035502 (Cal. Super. Ct. Aug. 4, 1992); once by the United States District Court for the District of Connecticut for $15,457.85, *Doctor's Associates, Inc. v. Kroll*, No. 3:94CV01738 (D. Conn. Aug. 2, 1995); and again by the United States Court of

2. Judge Sheppard's Denial of Mr. Duree's Motion to Set Aside Judge Russell's Sanctions Decision

After Judge Russell issued her decision to sanction Mr. Duree and revoke his *pro hac vice* admission (the "sanctions decision"), Mr. Duree filed a motion to alter or amend that decision. Before deciding the motion to alter or amend, however, Judge Russell recused herself from further involvement in the case because she was concerned about her "*continuing* objectivity." Pet. App. 91a (emphasis added). Seeking to capitalize on Judge Russell's recusal, Mr. Duree then filed a motion to set aside the sanctions decision.

Mr. Duree's motion to set aside the sanctions decision sought to attack Judge Russell's integrity on the basis of a conversation that Judge Russell had disclosed to Mr. Duree and counsel for DAI shortly after recusing herself. Pet. App. 89a-91a. According to Judge Russell, whose later testimony about the conversation was not contradicted, an old friend, attorney John Gerstle, stopped by her chambers *after* Judge Russell had already decided to sanction Mr. Duree and as she was completing the final sentences of her sanctions decision. During the conversation, Mr. Gerstle told Judge Russell that he was representing Ms. Kessler in an unrelated criminal matter, that Mr. Duree was paying Mr. Gerstle's fees to represent Ms. Kessler in that matter, and that Ms. Kessler had a cocaine problem. Mr. Gerstle also told Judge Russell that "Mr.

Appeals for the Second Circuit, for bringing a frivolous appeal. *Doctor's Associates, Inc. v. Kroll*, No. 95-7804 (2d Cir. Dec. 21, 1995).

Duree is a great guy. He's a really nice guy." Pet. App. 91a. That was the extent of the conversation. In his motion to set aside the sanctions decision, Mr. Duree claimed that Mr. Gerstle's disclosure about Ms. Kessler's cocaine problems and Mr. Duree's knowledge of his client's problems had somehow biased Judge Russell against Mr. Duree and had improperly influenced her decision to impose sanctions.

As a result of Judge Russell's recusal, Mr. Duree's motion to set aside the sanctions decision was heard by another judge – District Court Judge Lawrence E. Sheppard. Judge Sheppard carefully considered each of Mr. Duree's claims about the sanctions decision as well as Judge Russell's impartiality, after taking the truly extraordinary action of providing Mr. Duree an opportunity to depose Judge Russell and after holding an evidentiary hearing at which Judge Sheppard allowed Mr. Duree to examine Judge Russell about the conversation with Mr. Gerstle and her reasons for recusal. Pet. App. 55a, 92a, 95a.

After considering all the evidence, including the demeanor and credibility of Judge Russell, Judge Sheppard denied Mr. Duree's motion to set aside the sanctions decision. Judge Sheppard stated that he was "quite satisfied from listening to her testimony under oath that her decision was not influenced by the conversation with Mr. Gerstle." Pet. App. 76a. He also found as a fact that "a reasonable person would believe, based upon the testimony of Judge Russell, that there was no influence or bias on her part with respect to the decision that was filed." Pet. App. 77a. As Judge Sheppard explained, he

reached this conclusion "not because she's a colleague and a fellow jurist, but because"[:]

> She testified under oath forthrightly, without hesitation, with obvious knowledge of the facts, *and in a most unusual proceeding which allowed counsel to go into her subjective thought process as to how she arrived at her decision.* She was most candid in that regard and unequivocating in terms of the examination by both counsel. She clearly had firm reasons, as set forth in her memorandum decision, for making the ruling of sanctions as to David Duree and her revocation of Mr. Duree's pro hac vice status in this particular case.

Id. (emphasis added). In short, Judge Sheppard found that Judge Russell had made "a measured decision that she reached only after hearing the evidence in the case from the trial record and from all of the preceding proceedings." Pet. App. 77a-78a.

3. The Kansas Supreme Court's Review and Affirmance of the Rulings of Both Judge Russell and Judge Sheppard

Mr. Duree then appealed to the Kansas Supreme Court, which affirmed Judge Sheppard's ruling as well as Judge Russell's decision to impose monetary sanctions on Mr. Duree and to revoke his *pro hac vice* admission. The Kansas Supreme Court held that Judge Russell's decision to sanction Mr. Duree was fully supported by substantial evidence in the record and was in accord with Kansas law. In particular, the Kansas Supreme Court concluded that there was substantial evidence that Mr. Duree had, in

fact, "knowingly and not in good faith" directed the preparation and filing of a false tax return in order to mislead DAI and the trial judge about shortcomings that Mr. Duree recognized in his clients' claim. Pet. App. 103a. Writing for a unanimous court, Justice Six declared that "all litigation must be orchestrated on a common dominant theme, the purpose of truth. Candor and credibility, are the twin professional characteristics that mark a true officer of the court." Pet. App. 105a. These "twin professional characteristics" were, as the court recognized, woefully missing from Mr. Duree's conduct during this case.

The Kansas Supreme Court also rejected Mr. Duree's suggestion that the lower courts had somehow denied him due process.[2] In an observation that applies with equal force to his petition for certiorari, the court stated that "[t]hroughout his brief, Duree *misstates the record* and misconstrues Judge Russell's testimony about the *ex parte* conversation. Judge Russell admitted neither an inability to be fair and impartial nor an inability to separate extrajudicial knowledge from the issue of whether to award the sanctions." Pet. App. 94a (emphasis added). To the contrary, Judge Russell "unequivocally testified that she fairly and impartially decided the motion to award sanctions . . . without considering the Gerstle conversation." Pet. App. 94a-95a. She also testified that she did not "harbor any ill will toward Duree," testimony that both

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[2] Tellingly, Mr. Duree presented his due process claim to the Kansas Supreme Court as a mere aside. He devoted only about four of the 81 pages of his opening brief, and none of his reply brief, specifically to Fourteenth Amendment issues.

Judge Sheppard and a unanimous Kansas Supreme Court found to be credible. Pet. App. 94a.

In addition, the Kansas Supreme Court concluded from a review of the record that Mr. Duree "was afforded notice and a hearing at every state [sic] of the process." Pet. App. 95a. As the court said,

> Duree has had an independent review of his claims. Judge Sheppard conducted a full evidentiary hearing to learn whether Judge Russell should have recused herself earlier. The hearing afforded Judge Sheppard an opportunity to measure Judge Russell's demeanor, the quality of her memory, and her credibility. Judge Sheppard found that there was bad timing as to the Gerstle conversation but did not conclude that she had acted in anything but an impartial manner.
>
> . . . [Duree] presented witnesses and was even allowed to testify in a narrative form at the hearing on sanctions.

Id. (emphasis added). Accordingly, the court held, Mr. Duree's due process claim "lacks merit." Pet. App. 94a.

REASONS FOR DENYING THE PETITION

Petitioner's arguments for certiorari depend on his claim that the Kansas courts in some manner denied him due process of law under the Fourteenth Amendment. The petition should be denied for two fundamental reasons.

First, the Kansas courts afforded petitioner an extraordinary amount of due process and careful appellate review. No further review by the Court is warranted.

Second, there are no legal issues at stake meriting review by the Court. This case was decided primarily on Kansas state law grounds applied to highly case-specific facts involving bad faith litigation and the knowing creation and submission of false evidence. Since the Kansas law applied does not conflict with any federal constitutional standards, review by the Court is unwarranted.

I. THE KANSAS COURTS PROVIDED MR. DUREE WITH ALL THE DUE PROCESS, AND MORE, THAT THE CONSTITUTION REQUIRES.

Even a cursory review of the petition reveals that Mr. Duree wants this Court to revisit the *facts*, as reasonably found by Judges Russell and Sheppard and affirmed by a unanimous Kansas Supreme Court, rather than consider a serious due process claim. For example, as he did below, Mr. Duree argues that he had nothing to do with the submission of the false tax return[3] and that any impropriety with the

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[3] As he also did below, Mr. Duree seeks to misrepresent his role in the opposition to summary judgment. Mr. Duree repeatedly admitted under cross-examination at an April 16, 1996 hearing that he reviewed the brief in opposition to summary judgment and the accountant's affidavit before they were filed. Also, at the April 16, 1996 hearing, Mr. Duree acknowledged that he had "vigorously advanced the various positions that were set forth in" the opposition to summary judgment, and added: "I . . . still do." This testimony is reproduced in Respondent's Appendix ("Resp. App.") at 2-4, and was available to the Kansas Supreme Court. Moreover, a

return had to be somebody else's fault.[4] Petition for a Writ of Certiorari ("Pet.") at 3, 6, 12-13. He also makes the baffling and absurd argument that if the fraudulent tax return he manufactured was immaterial to the underlying summary judgment motion, it was not improper for him to submit it to the court. *Id.* at 26. There is no basis for the Court to consider these factual issues or to find a denial of due process.

Mr. Duree correctly points out in his petition that due process requires a fair and impartial tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955). But that is precisely what Mr. Duree received time and time again in this case.

First, Mr. Duree received a full evidentiary hearing, at which he presented evidence and was allowed to testify in narrative form, before Judge Russell issued her original sanctions decision. Then, when Mr. Duree questioned in his motion to set aside the sanctions decision whether Judge Russell had been fair and impartial, he received another evidentiary hearing before a different

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motion for sanctions against DAI's counsel, which was denied, represented that Mr. Duree had spent 22.6 hours, at the hourly rate of $300, working on the opposition to summary judgment. Resp. App. 6. Little wonder, therefore, that the Kansas Supreme Court concluded that Mr. Duree repeatedly misrepresented the facts in his brief to that court, and that he was, in fact, responsible for manufacturing a false income tax return. Pet. App. 94a, 103a.

[4] As the Kansas Supreme Court discovered, Mr. Duree "points the finger in all directions, at his co-counsel, Robert L. Carter, at Judge Russell, at counsel for DAI, Edward Dunham, and even at his own clients. He implies that he was an unwitting participant in an unfortunate, but not illegal or unethical pursuit of fraud claims." Pet. App. 103a. To this day, Mr. Duree continues to dissemble about his own role in this sordid affair.

judge – Judge Sheppard. At that hearing, Mr. Duree was permitted to present evidence and cross-examine Judge Russell, after having been afforded the extraordinary opportunity to depose the judge. Judge Sheppard then independently found that Judge Russell had, in fact, been fair and impartial when she sanctioned Mr. Duree. Moreover, Judge Sheppard found that "a reasonable person would [not] believe other than that Judge Russell made a deliberate, considered ruling without bias, [and] without prejudice." Pet. App. 79a.

The findings and rulings of Judges Russell and Sheppard were thereafter reviewed in their entirety by the Kansas Supreme Court, where Mr. Duree was permitted to file voluminous briefs, far in excess of the page limitations under Kansas rules. After undertaking its own review of the record, the Kansas Supreme Court found that all of the findings of fact made by Judges Russell and Sheppard were supported by substantial evidence and that their decisions were fully justified by both the facts and the law. Merely reciting this procedural history refutes Mr. Duree's claim that he did not receive due process in the Kansas courts.[5]

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[5] As to the revocation of Mr. Duree's *pro hac vice* status, the Court has previously ruled that an out-of-state attorney's right to appear *pro hac vice* is not subject to protection under the Fourteenth Amendment. *See Leis v. Flynt*, 439 U.S. 438, 443 (1979). Although it is generally understood that such admission should not be revoked without providing the attorney with notice and an opportunity to be heard, *see, e.g., United States v. Collins*, 920 F.2d 619, 626 (10th Cir. 1990), Mr. Duree was granted these rights.

Mr. Duree attempts to support his claim by citing to an inapplicable federal disqualification statute, 28 U.S.C. § 455, and cases decided under that provision. Pet. at 27-28. However, § 455 establishes a stricter standard for judicial disqualification than the Constitution requires. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21, 828 (1986) (disqualifying judge for direct pecuniary interest but noting that most matters relating to judicial disqualification do not rise to a constitutional level and that general allegations of bias and hostility do not suffice) (*citing FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)); *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) (due process clause requires judge to step aside when reasonable judge would find it necessary to do so, while federal statute requires disqualification when others would have reasonable cause to question judge's impartiality); *United States v. International Bus. Machs. Corp.*, 475 F. Supp. 1372, 1390 (S.D.N.Y. 1979), *mandamus denied sub nom. In re International Bus. Machs. Corp.*, 618 F.2d 923 (2d Cir. 1980) (claim of bias and prejudice that survives rigid scrutiny under statute necessarily passes due process constitutional muster). As a result, even Mr. Duree ultimately concedes that the federal disqualification statute is not an issue in this case. Pet. at 27-28.

Even if the stricter federal judicial disqualification statute were applicable, it would not have been violated in this case. Under that statute, a judge should recuse himself when "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Recusal is required only if "an objective, disinterested observer *fully informed of the facts underlying the grounds on which recusal was sought* would entertain a significant doubt that justice would be done in

the case." *Union Carbide Corp. v. United States Cutting Serv., Inc.*, 782 F.2d 710, 715 (7th Cir. 1986) (*quoting Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)) (emphasis added); *see United States v. DeLuna*, 763 F.2d 897, 907 (8th Cir.), *cert. denied sub nom. Thomas v. United States*, 474 U.S. 980 (1985); *In re Wirebound Boxes Antitrust Litig.*, 724 F. Supp. 648, 651 (D. Minn. 1989) (impartiality must be judged in light of full record, and not simply in light of isolated incident).[6] However, as Judge Sheppard found, and as the Kansas Supreme Court affirmed, a reasonable person after hearing the evidence, would *not* believe that Judge Russell's decision to sanction Mr. Duree was biased in any way. Pet. App. 77a, 94a. Indeed, when Judge Russell later came to believe that her "*continuing* objectivity" was threatened, she promptly and properly recused herself. Thus, the conduct of Judge Russell satisfied even the requirements of the federal disqualification statute, which imposes standards stricter than due process requires.

The cases cited by Mr. Duree bear little resemblance to this case. For example, in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), on which Mr. Duree

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[6] Mr. Duree also argues that, despite the lack of evidence supporting his claim, Judge Russell must have been biased for the simple fact that she ruled against him. Pet. at 25-27. This is clearly an insufficient basis for establishing bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"); *In re Bokum Resources Corp.*, 26 B.R. 615, 621 (D.N.M. 1982) (mere fact that judge has consistently ruled for or against one party cannot, standing alone, provide basis for finding of bias).

primarily relies, a federal district judge was a trustee of a party interested in the litigation, but never recused himself or disclosed his position. *Id.* at 855, 861, 866. The Court ultimately affirmed that vacatur was an appropriate remedy under the federal disqualification statute because another district judge had *applied the wrong standard for disqualification* when denying a motion to vacate. *Id.* at 851, 864-65.

By contrast to *Liljeberg*, Judge Russell voluntarily recused herself *before* either party knew of the *ex parte* conversation, she voluntarily disclosed the conversation to the parties, and she then subjected herself to deposition and cross-examination by Mr. Duree. Judge Sheppard later ruled against Mr. Duree after a full evidentiary hearing, *applying the correct standard under Kansas law*, unlike the second trial court judge in *Liljeberg*. Pet. App. 94a-95a. *Liljeberg*, therefore, provides no support for Mr. Duree's claim that Judge Russell's actions would have violated the federal disqualification statute, let alone the due process clause.[7]

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[7] Duree cites several other cases purportedly supporting his claims, all of which are readily distinguishable from this case. *See Bracy v. Gramley*, 520 U.S. 899 (1997) (holding that petitioner sentenced to death had made sufficient factual showing under habeas corpus rule to establish good cause for discovery on claim of actual judicial bias on the part of judge who was later convicted of taking bribes from criminal defendants); *Withrow v. Larkin*, 421 U.S. 35 (1975) (holding state medical examining board procedures constitutional); *In re Murchison*, 349 U.S. 133 (1955) (invalidating a Michigan law authorizing a "one-man grand jury" in criminal cases); *Offutt v. United States*, 348 U.S. 11 (1954) (criminal contempt ruling overturned after Court of Appeals concluded that the record did

Mr. Duree doggedly attempts to distract the Court with frivolous arguments that even he eventually acknowledges are inappropriate for consideration by the Court. Pet. at 23, 27. In the end, Mr. Duree's due process argument boils down to his assertion that the courts below must have been biased against him because they rejected his arguments. That is not a constitutional argument; it is sour grapes. As he has done throughout this litigation, Mr. Duree continues to try to blame everyone but himself for the situation in which he now finds himself. As the Kansas Supreme Court cogently observed, however, Mr. Duree's "predicament is self induced," and not a product of any constitutional violation. Pet. App. 102a.

II. THIS CASE PRIMARILY INVOLVES FACT-SPECIFIC KANSAS STATE LAW ISSUES THAT DO NOT CONFLICT WITH CONSTITUTIONAL MANDATES.

In the courts below, Mr. Duree's claims regarding the sanctions decision were primarily founded on, and decided pursuant to, Kansas law concerning the standards for recusal under state law and for the imposition of sanctions by Kansas courts. Tellingly, Mr. Duree devoted only about four pages of his 81-page opening brief in the Kansas Supreme Court specifically to Fourteenth Amendment issues, which he presented as an

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not support penalty imposed); *Tumey v. Ohio*, 273 U.S. 510 (1927) (conviction obtained under unconstitutional Ohio law; law provided that judges were paid for their efforts only if the defendant was convicted).

"alternative" argument, and he devoted none of his reply brief to these issues. The focus of his arguments, and the decisions below, was on Kansas law, and as even Mr. Duree acknowledges, "it is not the function of this court to review" determinations of Kansas law. Pet. at 27.

In deciding not to vacate the sanctions against Mr. Duree, the Kansas Supreme Court applied standards derived from *State v. Logan*, 689 P.2d 778, 784 (Kan. 1984). Pet. App. 94a-95a. Under *Logan*, a judge has the duty to recuse himself when his impartiality might reasonably be questioned, Pet. App. 95a, a standard that exceeds the federal constitutional mandates under the due process clause. *See United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) (due process clause requires judge to step aside when reasonable judge would find it necessary to do so, while the federal disqualification statute [similar to that of Kansas] requires disqualification when others would have reasonable cause to question judge's impartiality).

These standards were applied in a highly unusual and case-specific factual setting, with several layers of independent judicial review in the Kansas state court system. The Kansas Supreme Court's fact-bound decision to affirm the imposition of sanctions against Mr. Duree does not conflict with any decision of the Court or any other court. In short, there is no conflict and no legal issue of public importance that requires the Court's review. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Texas v. Mead*, 465 U.S. 1041, 1042 (1984).

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Date: April 7, 1999

APPENDIX A

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

DOCTOR'S ASSOCIATES

Plaintiff,

v. Case No. 90C12370

NANCY KESSLER and DANE BANKS

Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 16th day of April, 1996, the above-entitled matter comes on for hearing before the HONORABLE JANICE D. RUSSELL, Judge of Court No. 7 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

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(Appearances cont'd.)

* * *

[p. 129] before we ever move for summary judgment, before you filed your opposition, before you stood up here and did the oral argument on April 13th, 1995, Mr. Seiffert testified under oath – not once but twice in the same two- or three-page passage of his deposition – that the Kessler and Banks business records were in such a state that you could not file an accurate tax return based upon them; right?

A I see what it says, yes.

Q And she is going to have to take that into account in assessing your credibility as an officer of this Court and a witness, and your good friend, Mr. Seiffert's credibility; right, Mr. Duree?

A I have no problem with that.

Q Now, one more time under oath. The papers that your firm submitted in opposition to DAI's motion for summary judgment, including the brief, the affidavit of Mr. Seiffert, dated April 1st, the statement of purported opposition to DAI's statement of uncontested facts: Which of those documents did you review in whole or in part before they were filed with this Court?

A I reviewed the brief pretty much in whole [p. 130] because I was looking for the legal arguments to make. I reviewed very little of the response to the statements of uncontested facts, which were voluminous. I relied primarily upon discussions with Mr. Carter and the statements in the brief that there were issues of fact.

I reviewed the affidavit of Mr. Seiffert's primarily for the purpose of whether or not Nancy Kessler and Dane

Banks did or did not have money in the bank at the time they opened their business.

That's pretty much it.

Q Okay. And when you –

A I read a lot of cases.

Q And when you, as lead counsel, discharging your responsibilities, reviewed these documents before they were filed with the Court, the affidavit from Robert Seiffert dated April 1, 1995, contained the representation under oath that appears on this enlargement that I've placed before you, from Paragraph 3(n) where Mr. Seiffert took Robert Karn to task because Mr. Karn didn't quote the, quote, "correct," closed quote, figures from the amended tax return; correct?

* * *

[p. 133] put forth in the paper opposing the summary judgment? Correct?

A I was.

Q You didn't stand up here and say, in words or substance, "I renounce the position in those papers, I don't agree with it, I'm not relying on it." Quite the contrary, you vigorously advanced the various positions that were set forth in those briefs that you reviewed and that were filed; right?

A I do, and still do.

Q And after that hearing – I think that you testified about this; I just want to make sure that this is correct, that you have a clear recollection of being the person who

wrote the brief that your firm filed opposing, the supplemental brief opposing summary judgment, that was filed after the April 13th hearing; correct?

A I wrote the brief, not the attached affidavits, but I wrote the brief.

Q Okay. But you reviewed the affidavits before they were filed with the Court, again, consistent with your obligations as chief executive of your side of the case; right?

APPENDIX B

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS CIVIL COURT DEPARTMENT

SUBWAY RESTAURANTS, INC., SUBWAY EQUIPMENT LEASING CORP. AND DOCTOR'S ASSOCIATES, INC., Plaintiffs, v. NANCY KESSLER AND DANE BANKS, Defendants.	(No. 91-C-2679 Court No. 7: Chapter 60 Formerly No. 90-C2344 Court No. 1: Chapter 61) Consolidates with Cause No. 90-C-12370 Court No. 7 Chapter 60

DEFENDANTS' MOTION FOR SANCTIONS

COMES NOW Defendants, and pursuant to §60-211 of the Kansas Rules of Civil Procedure, move this Honorable Court to impose sanctions on Plaintiffs, Doctor's Associates, Inc., and its attorneys, Edward Wood Dunham and Wiggin & Dana. In support of this Motion, Defendants state as follows:

1. Pursuant to §60-211, the signature of a person on pleadings constitutes a certificate by that person that the person has read the pleading, that to the best of the person's knowledge, information and belief, the pleading was made in good faith, and that the pleading was not imposed for any improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the

cost of litigation. If a pleading violates this Section, the Court, upon motion or upon its own initiative, shall impose on the person who signed the pleadings or the represented party, or both, an appropriate sanction,

* * *

7. In responding to the Motion for Summary Judgment, the following is a list of costs and attorney fees expended:

David M. Duree	22.60 hours	$300 per hour
Robert L. Carter	85.20 hours	$150 per hour
Don W. Weber	93.10 hours	$150 per hour
Catherine A. Miller (paralegal)	34.00 hours	$ 45 per hour
Photocopy charge		$ 1,006.42
Total Costs Expended:		**$23,366.62**

8. It is well established under Kansas law, that a party filing a frivolous pleading, or a pleading in bad faith, can be sanctioned. See e.g. *Frankhauser v. Bank IV Emporia*, 833 P. 2d 1002, 1006-1007 Kan. (1992).

WHEREFORE Defendants pray that pursuant to §60-211 of the Kansas Rules of Civil Procedure, this Court impose sanctions on Plaintiffs by doing the following: (a) striking the 169 paragraphs of irrelevant "uncontroverted facts" advanced by Plaintiffs; (b) denying Plaintiffs' Motion for Summary Judgment; (c) awarding attorney fees and costs to Defendants in a total amount of

$23,366.62; (d) for such other and further relief as this Court deems just, necessary and proper.

REINERT & DUREE, P.C.

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent by Facsimile and First Class U.S. Mail, postage prepaid, this 12th day of APRIL, 1995 to:

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